Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Application by Ameritech Michigan	)	
Pursuant to Section 271 of the	)	CC Docket No. 97-137
Telecommunications Act of 1996 to	)	
Provide In-Region, InterLATA	)	
Services in Michigan	)	

REPLY COMMENTS IN OPPOSITION OF THE NATIONAL CABLE TELEVISION ASSOCIATION

Daniel L. Brenner
Neal M. Goldberg
David L. Nicoll
National Cable Television Association
1724 Massachusetts Avenue, N.W.
Washington, D.C. 20036
202/775-3664

Howard J. Symons
Christopher J. Harvie
Michael B. Bressman
Mintz, Levin, Cohn, Ferris
Glovsky and Popeo. P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
202/434-7300

July 7, 1997

TABLE OF CONTENTS

Page

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Application by Ameritech Michigan	)	
Pursuant to Section 271 of the	)	CC Docket No. 97-137
Telecommunications Act of 1996 to	)	
Provide In-Region, InterLATA	)	
Services in Michigan	)	

REPLY COMMENTS IN OPPOSITION OF THE NATIONAL CABLE TELEVISION ASSOCIATION

The National Cable Television Association ("NCTA"), the principal trade association of the cable television industry, hereby submits these reply comments opposing the grant of the Application of Ameritech Michigan ("Ameritech") to provide in-region interLATA services in Michigan ("Application").

INTRODUCTION AND SUMMARY

Section 271 of the Telecommunications Act of 1996 ("Act" or "1996 Act") reflects Congress's fundamental policy decision that to promote competition the Bell Operating Companies ("BOCs") may not provide in-region interLATA services in a particular State until both business and residential consumers have a meaningful opportunity to choose among two or more facilities-based providers of local exchange service that are competing on a level playing field.

In assessing Ameritech's Application, the Act requires the Commission to focus on whether business and residential customers of local telephone service have a meaningful opportunity to choose between two or more commercially-viable and durable local service providers. In addition, the Commission must determine that Ameritech will provide in-region interLATA services in accordance with the rules implementing the competitive and nondiscrimination safeguards set forth in Section 272. Because the record in this case shows that neither of these threshold statutory requirements has been met, Ameritech's Application must be rejected.

The Commission also must examine whether Ameritech has fully implemented the Act's competitive checklist through the actual furnishing of each of the fourteen checklist items to a competitor or competitors in accordance with the Act's requirements. In this instance, there is considerable evidence indicating that Ameritech has failed fully to comply with the checklist requirements. Ameritech does not provide competitors with access to its poles at reasonable rates or on a nondiscriminatory basis, has failed to unbundle certain network elements in accordance with the Act's requirements, and is not furnishing checklist items in accordance with the pricing requirements specified in Section 271. Moreover, Ameritech is not actually providing some checklist items to competitors. Under these circumstances, there is no basis for concluding that the Act's competitive checklist is fully implemented.

The public interest also compels denial of the Application. Granting Ameritech's request at this juncture would imperil the prospects for meaningful and lasting local competition in Michigan. Congress intended that the opportunity to provide in-region interLATA service would induce the BOCs to open their local exchange monopolies to facilities-based competitors in accordance with the competitive checklist embodied in section 271.[1/] The Commission itself has recognized that the BOCs "have no economic incentive, independent of the incentives set forth in sections 271 and 274 of the 1996 Act, to provide potential competitors with opportunities to interconnect with and make use of the incumbent LEC's network and services."[2/]

[1/] In discussing the Senate version of Section 271, which was adopted by the Conference Committee, Senator Kerrey noted that "[t]he way to overcome this ability of the RBOC to thwart the open local markets is to give them a positive incentive to cooperate in the development of competition." See, e.g., 141 Cong. Rec. S8139 (daily ed. June 12, 1995) (statement of Sen. Kerrey). Likewise, during House consideration of the Conference Report, Rep. Hastert stated that "[f]air competition means local telephone companies will not be able to provide long-distance service in the region where they have held a monopoly until several conditions have been met to break that monopoly." 142 Cong. Rec. H1152 (daily ed. Feb. 1, 1996) (statement of Rep. Hastert) (emphasis added).

[2/] Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 (rel. August 8, 1996) ("Local Competition Order") at ¶ 55.

If authorized prematurely to provide in-region interLATA services, Ameritech would have a substantially reduced incentive to negotiate and implement access and interconnection agreements that provide new entrants with a meaningful opportunity to compete. By making BOC entry into long distance contingent upon "full" implementation of interconnection agreements with new entrants, Congress sought to ensure that the BOCs would carry out their duties under such agreements in a timely and useful manner. That incentive, however, disappears once the BOCs are permitted to enter the long distance market.

Absent countervailing incentives, BOCs will vigorously resist efforts to open their markets to competition not only via litigation, but also through negotiation delays, protracted provisioning of services, and other stalling tactics.[3/] The importance of the local competition incentive embodied in Section 271 is vividly illustrated by the fact that two ILECs already authorized to provide long distance service, GTE and SNET, have led the effort to invalidate the local competition rules recently promulgated by the FCC under Section 251 of the Act.[4/] Lacking the incentive of access to a new revenue stream, GTE and SNET have aggressively sought to preserve their local exchange monopolies.[5/] Their conduct amply demonstrates that prematurely granting Ameritech's Application would halt the progress toward local competition in Michigan.

3/ See, e.g., United States v. American Tel. & Tel. Co., 524 F. Supp. 1336, 1355-56 (D.D.C. 1981); United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 187-88, 195, 223 (D.D.C. 1982); MCI Communications v. American Tel. & Tel. Co., 708 F.2d 1081, 1132-33, 1139-40, 1158-59 (7th Cir. 1983); Local Competition Order at ¶¶ 141, 145-147.

4/ See "Telecom Law Faces Challenge in Court," Wall St. J., Aug. 29, 1996, at A3.

5/ GTE, the largest local exchange company in the country, has sought to skirt obligations under Section 251 of the Act by asking state regulators for relief from such requirements pursuant to an exemption that Congress designed for small and rural telcos. See "Virginia Rejects GTE's Request for Rural Status," Multichannel News, Nov. 11, 1996, at 34 (quoting spokesman for State commission as saying that granting GTE's request "really would have slowed down the entrance of competition into GTE's service area"); "Why Phone Rivals Can't Get Into Some Towns," Wall St. J., Aug. 19, 1996, at B1 (noting that GTE "plans to invoke a little-known provision in the new law that exempts rural phone companies and small operators from a raft of rules that would ease rivals' entry into their markets"). SNET, which dominates the local market throughout the State of

I. AMERITECH HAS NOT MET THE REQUIREMENTS OF SECTION 271(c)(1)(A)

Ameritech has submitted its Application under Section 271(c)(1)(A) of the Telecommunications Act of 1996 ("Act"). To satisfy the requirements of "Track A," Ameritech must furnish network access and interconnection to at least one unaffiliated competitor that provides telephone exchange service to both business and residential consumers predominantly over its own facilities.[6/] Ameritech has failed to demonstrate that it has met these criteria.

A. Ameritech Has Misstated the "Facilities-Based" Provider Requirement Adopted by Congress

To satisfy section 271(c)(1)(A), a BOC must furnish access and interconnection "to its network facilities for the network facilities" of one or more unaffiliated competing providers offering telephone exchange service "either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier."[7/] Ameritech claims that, under the Act, competitors that purchase access to unbundled network facilities and equipment from Ameritech," may be considered "exclusively" or "predominantly" facilities-based providers.[8/] This argument misconstrues Section 271 and promotes unsound competitive policy.

(..continued)
Connecticut, also has sought to invoke the small carrier exemption in order to avoid duties under Section 251. See id. at B3.

6/ 47 U.S.C. § 271(c)(1)(A).

7/ Id.

8/ Brief in Support of Application by Ameritech Michigan for Provision of In-Region, InterLATA Services in Michigan at 12-14 ("Ameritech Brief"). In their Eighth Circuit briefs, by contrast, the large LECs argue vociferously that carriers using unbundled elements are not facilities-based providers. See Iowa Utilities Board, Et. Al. v. Federal Communications Commission and United States of America, United States Court of Appeals for the Eighth Circuit, Case No. 96-3321, Brief for Petitioners Regional Bell Companies and GTE, Nov. 18, 1996, ("RBOC Brief") at 7 (contrasting competition achieved through exclusive reliance upon the purchase of unbundled elements by new entrants with "the goal of promoting vigorous facilities-based competition"). See also id. at 49, 62.

Had Congress intended for leased network elements obtained from the BOC applicant to be encompassed within the rubric of a competitor's "own facilities," it could have easily so specified. Nothing in Section 271 indicates that Congress intended that a competitor's "own facilities" would include the bottleneck facilities actually owned by the BOCs. Indeed, the Conference Report strongly suggests that Congress viewed the leasing of unbundled elements as a necessary transition mechanism to the type of full-fledged, facilities-based competition envisioned under the Act.[9/] In addition, the requirement that the competitor be "unaffiliated" with the BOC presupposes a degree of independence that cannot be realized if the competitor is exclusively or predominantly dependent upon the BOC's facilities in order to offer service.

Congress sought to promote "meaningful facilities-based competition,"[10/] which cannot come about if service to all consumers is being provided over a single set of network facilities. Competing networks are necessary to foster efficient service delivery, innovation, and deployment of new technologies, to expand service offerings, and to promote quality.[11/] A definition of "predominantly facilities-based" that includes the competitor's ownership or control of the switches,

---

[9/] See H.R. Conf. Rep. No. 104-458, at 148 (1996) ("Conference Report") (noting unlikelihood that competitors will have fully redundant networks when they "initially offer local service" and recognizing need to lease network elements); see also id. (characterizing initial forays into local telephony by cable companies as holding the promise of the type of "local residential competition that has consistently been contemplated"); Application by SBC Communications Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Oklahoma, Memorandum and Order, CS Docket No. 97-121, (rel. June 26, 1997) ("SBC Application Order") at ¶ 43 ("Congress by intending Track A to be the primary entry vehicle, understood that there would be some delay between the passage of the 1996 Act and actual entry by facilities-based carriers into the local market").

[10/] Conference Report at 148.

[11/] See, e.g., Policy and Rules Concerning Rates for Dominant Carriers, 4 FCC Rcd 2873, 2954, ¶ 156 (1989) ("Only if rival networks are available to customers can competition be relied upon to help maintain service quality"). See also Interconnection Between Local Exchange Carriers and Commercial Mobile Service Providers; Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Service Providers, Notice of Proposed Rulemaking, 11 FCC Rcd 5020, 5025, ¶ 10 (1996) ("Facilities-based competition can confer benefits on customers such as lower prices, accelerated innovation, and deployment of new technologies").

trunks, and subscriber loops over which service is provided to the bulk of its subscribers would promote sound competitive policy and represents the type of extensive deployment of alternative network facilities envisioned by Congress.[12/]

By requiring that a competitor utilize exclusively or predominantly its "own facilities," Congress sought to ensure that BOC entry into in-region interLATA services would not be triggered until a meaningful, independent alternative provider of telephone exchange service had emerged within the State covered by the application. Competitors that offer local service exclusively or predominantly over their own facilities are likewise less vulnerable to anticompetitive tactics than are competitors that rely significantly upon incumbent carrier facilities to provide competing local exchange service.

Ameritech's reliance upon the Commission's construction of the term "own facilities" in the Universal Service Order is misplaced.[13/] First, the statutory provision construed in that order, Section 214(e)(1)(A), is not identical to the language of Section 271(c)(1)(A).[14/] The latter's emphasis on "telephone exchange service" facilities – which is absent in Section 214(e)(1) -- underscores Section 271's concern with engendering a facilities-based alternative telephone exchange service provider. Significantly, the Commission expressly stated in the Universal Service Order that it was not purporting to construe the term "own facilities" for purposes of

---

[12/] Cf. RBOC Brief at 56 ("After all, it is precisely where the new entrant can avail itself of non-LEC elements that the pressure of true facilities-based competition is greatest").

[13/] Ameritech Brief at 13-14; Federal-State Joint Board on Universal Service, CC Docket No. 96-45 (rel. May 8, 1997) ("Universal Service Order") at ¶¶ 154-68.

[14/] Compare Section 214(e)(1)(A) (authorizing support for a carrier "using its own facilities or a combination of its own facilities and resale of another carrier's services") with Section 271(c)(1)(A) (requiring presence of one or more competing providers offering service "over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier").

Section 271.[15/] Second, the term "own facilities" appears in the second sentence of Section 271(c)(1)(A) in order to elaborate upon the requirement set forth in the first sentence. The first sentence makes clear that a BOC's entry into in-region long distance depends upon its provision of access "to its network facilities *for the network facilities of one or more unaffiliated competing providers* of telephone exchange service . . . to business and residential subscribers."[16/] Construing "own facilities" to encompass a competitor's purchaser of a BOC's unbundled network facilities would be inconsistent with the requirement that entry be triggered only if access and interconnection is being provided "for the network facilities" of a competitor.

Third, statutory terms must be construed in accordance with the overall goals of the provisions at issue and the statute as a whole.[17/] The Universal Service proceeding was designed to identify the instances in which a carrier's expenditure of funds and resources to serve a high-cost area would render that carrier eligible for universal service support.[18/] Precluding cost support to carriers that had purchased unbundled network elements to serve such areas would frustrate the goals of the Act's universal service provision as well the Act's competitive purposes, by discouraging entry into high-cost areas. By contrast, the Commission's task in this context is markedly different. The purpose of Section 271 is to ensure that there is a viable and effective competitive alternative to a BOC prior to authorizing its entry into the in-region long

---

[15/] Universal Service Order at ¶ 168.

[16/] 47 U.S.C. § 271(c)(1)(A) (emphasis added).

[17/] See, e.g., Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 115 S. Ct. 2407, 2415 (1995) (stating that canon of construction known as *noscitur a sociis* counsels that statutory language "gathers meaning from the words around it") (quotation omitted); Massachusetts v. Morash, 490 U.S. 106, 116 (1989) (stating that statutory interpretation is not guided by a "single sentence or member of a sentence" but by the provisions, object, and policy of the whole law) (quotation omitted); United Sav. Ass'n v. Timbers of Inwood Forest Assoc., 484 U.S. 365, 370 ("Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme") (citation omitted).

[18/] See Universal Service Order at ¶¶ 22-24.

distance business. In furtherance of this goal, Section 271(c)(1)(A) requires there to be a competitor that offers services predominantly over its own facilities. Section 214(e), with its different purpose, does not include such a requirement. To construe "own facilities" in Section 271 as encompassing a CLEC's purchase of unbundled network facilities would prematurely authorize entry before the emergence of an effective and independent counterweight to the bottleneck facilities controlled by the BOCs.[19/]

The objectives of Section 271 can only be fulfilled by predicating entry on the presence of a competitor that predominantly relies on its own facilities to provide its competing local exchange service. In the instant case, Brooks Fiber, the only competing provider of local exchange service presently serving both business and residential subscribers, heavily depends on Ameritech facilities to serve its customers.[20/] Thus, the record precludes a conclusion that a predominantly facilities-based provider of local exchange service is present in Michigan. Because the Application fails to make such a showing, it should be rejected.

[19/] See Opposition of Brooks Fiber Communications of Michigan to Ameritech's Application ("Brooks Fiber Opposition") at 8-9; Motion to Dismiss by the Association for Local Telecommunications Services ("ALTS Motion") at 24.

[20/] See Brooks Fiber Opposition at 7 (noting that Brooks Fiber "relies on Ameritech to provide it with facilities for . . . 61% of its business customers and . . . 90% of its residential customers"); id. at 9 (noting that only 31% of the access lines used by customers to reach Brooks Fiber's

B. None of the Competitors to Whom Ameritech Furnishes Access and Interconnection Serves Both Business and Residential Subscribers to the Degree Necessary to Permit Entry Under Section 271(c)(1)(A)

The Act's legislative history expressly states that the "requirement that the BOC 'is providing access and interconnection' means that the competitor has implemented the agreement and the competitor is operational."[21/] The record demonstrates that, currently, Brooks Fiber is the only operational competitor to whom access and interconnection is being provided that serves both business and residential customers.[22/]

Even assuming *arguendo* that Brooks Fiber provides competing local service exclusively or predominantly over its own facilities, the scope of its offering does not satisfy the requirements of Section 271(c)(1)(A). Strict adherence to the "operational" standard requires that authorization be withheld absent concrete evidence that the interconnection agreements mandated by the Act have actually engendered meaningful and practical competitive choices for residential and business customers. The legislative history of Section 271 characterizes the "initial forays of cable companies" into local telephony as holding "the promise" of the kind of competition the Act seeks to promote.[23/] The Conference Report specifically notes, for example, that Jones Intercable is actively pursuing plans to offer local telephony "in significant markets" and that Cablevision has entered into an interconnection agreement with New York Telephone "with the goal of" providing service on Long Island to 650,000 people.[24/]

The reference to "the promise" held by the "initial forays" of cable companies suggests that Congress did not intend for nascent local telephone operations provided by competitors, such as that offered by Brooks Fiber, to permit entry under Section 271(c)(1)(A). Congress directed that

---

[21/] Conference Report at 148.

[22/] See Evaluation of the United States Department of Justice ("DOJ Evaluation") at 6.

[23/] Conference Report at 148.

[24/] Id.

BOC entry into in-region interLATA services could only be triggered in States where operational facilities-based providers offered meaningful competition for both business and residential subscribers.[25/]

The Application identifies only one competing provider furnishing service to residential subscribers, Brooks Fiber, which presently serves only a minuscule portion of a single market in the entire State of Michigan.[26/] While Section 271 does not specify a particular quantitative metrics test for triggering BOC long distance entry, it likewise does not require the Commission simply to ignore the scale and scope of competitive local exchange operations in evaluating a BOC entry application. Here, the scale and scope of Brooks Fiber's local exchange operations do not, at this juncture, offer an adequate basis for determining that the access and interconnection provided by Ameritech enables competitors to offer business and residential customers in Michigan a realistic choice of viable local service providers. The provision of competing local exchange service to a handful of a State's residential subscribers cannot be construed to satisfy Section 271's requirement of "meaningful facilities-based competition."[27/]

[25/] See id.

[26/] See Comments of Michigan Attorney General Frank J. Kelley ("Comments of Michigan Attorney General") at 6 ("Brooks Fiber serves only 1.1% of the Grand Rapids local market"). In its Opposition, Brooks Fiber notes that it serves 15,786 business lines and 5,910 residential lines in Grand Rapids. Brooks Fiber Opposition at 7-8. Thus Brooks Fiber serves roughly two-tenths of one percent of the entire Michigan residential market. See Comments of the Michigan Cable Telecommunications Association ("MCTA Comments") at 18 (noting 3.2 million residential access lines in the State of Michigan).

[27/] See Conference Report at 148 (emphasis added).

II. AMERITECH HAS NOT MET THE ACT'S REQUIREMENT THAT ALL ITEMS IN THE COMPETITIVE CHECKLIST BE FULLY IMPLEMENTED IN ACCORDANCE WITH THE ACT'S REQUIREMENTS

A. Ameritech Has Failed to Implement Checklist Items In Accordance with the Act's Requirements

Section 271 obligates Ameritech to implement the competitive checklist consistent with specific rules governing those items adopted by the Commission.[28/] In addition, a number of checklist items also are subject to a nondiscrimination condition.[29/] Ameritech, however, has failed to furnish several checklist items in accordance with these requirements.

First, as detailed comprehensively by the Michigan Cable Telecommunications Association, Ameritech has failed to provide its competitors with access to its poles, ducts, conduits and rights-of-way at just and reasonable rates and on a nondiscriminatory basis.[30/] In addition, both TCG and Brooks have noted that Ameritech has refused to make reciprocal compensation payments to them as required by both Section 251(b)(5) and the Section 271 checklist.[31/] Ameritech's failure to provide these fundamental competitive prerequisites in the statutorily-prescribed manner means that even full-fledged facilities-based providers that do not rely upon any unbundled elements from Ameritech still cannot effectively compete in the Michigan local market.

Second, several commenters have submitted evidence showing that certain other checklist items required to be provided by a BOC applicant -- such as operations support systems ("OSS"), E911 service, and interoffice transport -- are not being furnished by Ameritech in accordance with

---

28/ See generally 47 U.S.C. § 271(c)(2)(B).

29/ Id.

30/ MCTA Comments at 2-13.

31/ Comments of Teleport Communications Group ("TCG Comments") at 17-18; Brooks Fiber Opposition at 34-35. ALTS also points out that Ameritech has refused to clarify whether it will pay CLECs for transport and termination of calls to Internet services providers utilizing CLEC networks. ALTS Motion at 40-44.

the Act's requirements.[32/] The problems associated with Ameritech's failure to furnish checklist items in accordance with the Act's requirements are magnified because, as several commenters note, Ameritech is not subject to performance standards that ensure their compliance with its statutory obligations.[33/] Thus, at present, there is no effective mechanism – other than denial of the instant Application – for ensuring that Ameritech actually furnishes checklist items in the prescribed manner.

Third, Ameritech cannot be deemed to have provided interconnection, unbundled elements, and other checklist items in accordance with the Commission's pricing rules, because those rules have been stayed by the Eighth Circuit Court of Appeals. As ALTS points out Ameritech opposed the motion for stay, recognizing that postponing implementation of the FCC's pricing rules could adversely affect BOC efforts to gain entry under Section 271.[34/] To satisfy the requirements of Section 271(c)(2)(B), Ameritech must demonstrate that the prices for checklist items are based upon cost studies conducted in accordance with the standards set forth by the Commission.[35/] The record here shows that the rates for several checklist items are neither cost-based nor in accordance with the Commission's rules and the standards set forth in Section 252.[36/] Interim prices for interconnection, unbundled elements, and other items that are not in accord with the Commission's rules cannot suffice to constitute compliance with the competitive checklist. Thus, even if the

---

[32/] See DOJ Evaluation at 9-27 (noting Ameritech's failure to provide unbundled switching, unbundled transport, interconnection trunking, and OSS service in accordance with the Act's requirements); Consultation of the Michigan Public Service Commission ("MPSC Consultation") at 14-35, 38-47 (failing to find Ameritech compliance with OSS, E911, and shared transport checklist items); ALTS Motion at 3-8; Brooks Fiber Opposition at 12-34.

[33/] DOJ Evaluation at 38-40; MPSC Consultation 30-33; TCG Comments at 9-11.

[34/] See ALTS Motion at 22.

[35/] See, e.g., 47 U.S.C. § 271(c)(2)(B)(i)-(ii)(requiring that interconnection and unbundling be provided in accordance with the pricing standards delineated in Section 252(d)).

[36/] See MPSC Consultation at 8-10; DOJ Evaluation at 41-42; ALTS Motion at 19-22; TCG Comments at 13-17.

courts ultimately were to find that the Commission lacked authority to establish pricing standards pursuant to Section 252,[37/] Ameritech's prices for interconnection and unbundling would still fail to satisfy the checklist because they are interim prices that have not been established in accordance with any cost studies.[38/]

B. The "Full Implementation" Criterion Requires Ameritech Actually to Furnish Competitors All of the Items in the Competitive Checklist

Section 271(d)(3)(A) precludes a BOC from being authorized to enter the long distance business under Track A unless it has "fully implemented" all of the items in the competitive checklist.[39/] The Act requires the BOCs to fully implement all of the checklist items in agreements with "operational" competitors in order to ensure that competition is not hampered by a BOC's failure to provide, or inadequate provision of, any of the checklist items.[40/] The checklist represents Congress' policy judgment regarding the essential prerequisites for the emergence of competitive alternatives to the BOCs' local exchange monopolies.[41/]

While subsection (c)(1)(A) conditions BOC entry upon the presence of a predominantly facilities-based provider, subsection (c)(2) requires "full implementation" of all checklist items in order to ensure the feasibility of competition in all markets within a particular State that are the

---

[37/] Such a holding would not disturb the FCC's authority under Section 271 to determine whether a BOC's prices for interconnection and unbundled elements met the requirements of Section 252(d).

[38/] See 47 U.S.C. § 252(d)(1) (requiring that rates for interconnection and unbundled elements "be based on the cost . . . of providing the interconnection or network element").

[39/] See 47 U.S.C. §271(d)(3)(A)(i) (requiring full implementation of the competitive checklist); id., § 271(d)(4) (barring the Commission from limiting the terms used in the competitive checklist); see also SBC Application Order at ¶ 46 ("In order to gain entry under Track A, a BOC must demonstrate that it has 'fully implemented' the competitive checklist in section 271(c)(2)(B)").

[40/] See Conference Report at 148.

[41/] The House Report states that "[i]n the Committee's view, the `openness and accessibility' requirements are truly validated only when an entity offers a competitive local service in reliance on those [checklist] requirements." House Report No. 104-204, Part 1, at 77 (1995).

subject of a BOC's application, including those not presently served by a predominantly facilities-based provider. The presence of a facilities-based provider represents "tangible affirmation" that a particular State "is indeed open to competition."[42/] At the same time, the full implementation of the checklist by a BOC with an operational competitor ensures the feasibility of entry throughout that State, particularly in areas not served by the competitor triggering entry under Track A:

> The requirement of an operational competitor is crucial because, under the terms of section 244, whatever agreement the competitor is operating under must be made generally available throughout the State. Any carrier in another part of the State could immediately take advantage of the `agreement' and be operational fairly quickly. By creating this potential for competitive alternatives to flourish rapidly throughout the State, with an absolute minimum of lengthy and contentious negotiations once an initial agreement is entered into, the Committee is satisfied that the `openness and accessibility' requirements have been met.[43/]

In its Application, Ameritech concedes that it is not actually furnishing a key checklist item -- local switching -- to any competitor pursuant to an access and interconnection agreement.[44/] The Commission cannot grant the instant Application unless Ameritech is actually providing each of the 14 items in the competitive checklist to one or more competitors within Michigan. The Act's full implementation requirement presupposes an operational, "on-the-ground" assessment of the efficacy with which checklist items are being provided.[45/] The Application precludes such an assessment because a key checklist item is not actually being furnished to an operational competitor.

The assessment of whether the "full implementation" requirement has been met necessitates tangible data regarding the manner in which the essential building blocks for competition are being provided to new entrants. The Act's purposes would be thwarted by permitting Ameritech to enter the long distance market before there has even been an opportunity to engage in an operational

---

42/ Id.

43/ Id.

44/ Ameritech Brief at 15.

45/ See Conference Report at 148.

assessment of the efficacy of the competitive checklist in fostering "meaningful facilities based competition." Contrary to Ameritech's claim, the fact that existing competitors have not as yet requested a particular checklist item does not mean that item is unnecessary to engender successful competition.[46/] Instead, it simply reflects the embryonic state of local competition in Michigan, rather than the item's lack of competitive utility.

The full implementation requirement ensures that a BOC cannot frustrate "meaningful" local competition in a State by obtaining interLATA authorization based upon a stripped-down interconnection agreement that omits key items but suffices for a competitor in its early stages of development. The requirement also ensures that the Commission makes its entry determination based on a pragmatic assessment of the BOC's actual performance in furnishing each checklist item to competitors. Ameritech -- and any other BOC applicant -- would frustrate these objectives if it were granted entry even in States where it failed to actually furnish one or more checklist items to competitors.

Indeed, the instant case underscores the need for subjecting Ameritech's compliance with the checklist to a full operational assessment, because there is considerable evidence that Ameritech is not actually providing several of the items in a manner in accordance with the Act's requirements. Moreover, adoption of Ameritech's construction of the "full implementation" criterion would undoubtedly encourage BOC delay in the actual provisioning of checklist items, because a BOC could still gain interLATA entry based upon the mere availability of such items.[47/]

NCTA does not dispute that a BOC may "mix and match" individual checklist items from different agreements in order to satisfy the "full implementation" requirement through a combination of agreements, so long as (i) all interconnecting parties -- in accordance with Section

---

[46/] Ameritech Brief at 18-19.

[47/] Cf. id. at 19.

252(i) and the Commission's rules thereunder[48/] -- are permitted to obtain any rate, term or condition set forth in an agreement approved under Section 252, and (ii) the operational effect of the combination of agreements results in the actual furnishing of all fourteen checklist items to a combination of competitors.[49/] In the instant case, however, it does not appear that either of these two prerequisites are met.

Ameritech itself acknowledges that it is not actually furnishing all fourteen checklist items to competitors in Michigan. Moreover, at the request of the BOCs and other incumbent local exchange companies (ILECs), the Commission's rule implementing Section 252(i) has been stayed by the Eighth Circuit Court of Appeals. While Ameritech claims in its Application that "most favored nation" clauses are set forth in the agreements reached with Brooks Fiber, MFS, and TCG,[50/] there is no guarantee that future competitors will be able to obtain such clauses in their agreements. More importantly, the efficacy of the most favored nation clauses obtained by Brooks Fiber, MFS and TCG is also uncertain. Unlike the Commission's rules implementing Section 252(i),[51/] there is not an express prohibition against the imposition of a "comparability" requirement as a precondition to a competitor's utilization of an individual interconnection element set forth in another agreement. Indeed, the Michigan Public Service Commission has expressly noted the

---

[48/] 47 U.S.C. § 252(i); 47 C.F.R. § 51.809.

[49/] A BOC should not, however, be permitted to combine checklist items set forth in an agreement with checklist items set forth in a general statement submitted under Track B. As demonstrated above, Congress clearly intended for reviewing authorities examining applications under Track A to assess the efficacy of the requesting BOC's actual performance in connection with implementation of the checklist items. See Conference Report at 148.

[50/] Ameritech Brief at 16.

[51/] Cf. 47 C.F.R. § 51.809 ("An incumbent LEC may not limit the availability of any individual interconnection, service, or network element only to those requesting carriers serving a comparable class of subscribers or providing the same service (*i.e.*, local, access, or interexchange) as the original party to the agreement").

ability of Brooks, MFS and TCG actually to use their MFN clauses is "problematic" due to the manner in which those clauses are structured.[52/]

III. AMERITECH CANNOT BE DEEMED TO BE IN COMPLIANCE WITH THE REQUIREMENTS OF SECTION 272

The Commission cannot approve the instant request to enter the in-region interLATA services market unless it determines that Ameritech will provide such services in accordance with the requirements of Section 272.[53/] The importance of Section 272(c)(1) is heightened in this instance because Ameritech has already indicated that it will be providing both interLATA and resold local exchange services through its new affiliate, ACI.[54/] Thus, new entrants into the local market in Michigan, as well as existing interexchange providers, will need assurance that Ameritech cannot discriminate in favor of its affiliate in ways that affect either the local or interexchange market.[55/]

Indeed, Ameritech's track record to date underscores the need for such assurances. TCG has submitted extensive evidence showing that Ameritech, in its dealings with ACI, is not complying with the structural and nondiscrimination safeguards delineated in Section 272.[56/] The Michigan

---

[52/] MPSC Consultation at 7.

[53/] 47 U.S.C. § 271(d)(3) See also Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-149 (rel. Dec. 24, 1996) ("Non-Accounting Safeguards Order") at ¶ 3 ("The 1996 Act conditions the BOCs' entry into in-region interLATA services on their compliance with certain provisions of section 271. Under section 271, we must determine, among other things, whether the BOC has complied with the safeguards imposed by section 272 and the rules adopted herein") (emphasis added).

[54/] See "Bells Sidestep Local Service Regulations," Wall St. J., July 15, 1996, at A3; "Bells Seeks to Create Unregulated Units; Plan Would Allow Affiliates to `Bundle' Phone Services in Parent's Area," Washington Post, July 16, 1996, at C2.

[55/] Cf. Non-Accounting Safeguards Order at ¶ 206 ("the section 272(c)(1) nondiscrimination provision is designed to provide the BOC an incentive to provide efficient service to rivals of its section 272 affiliate, by requiring that potential competitors do not receive less favorable prices or terms, or less advantageous services from the BOC than its separate affiliate receives").

[56/] TCG Comments at 27-39; id., Affidavit of Dr. Paul Teske.

Cable Telecommunications Association has shown that Ameritech has provided preferential access to its poles and rights-of-way to Ameritech New Media.[57/] Brooks Fiber also has detailed several instances of discriminatory conduct by Ameritech that hinder the ability of unaffiliated entities to enter or effectively compete in the local exchange market.[58/] In addition, several commenters have noted that Ameritech has refused to implement a Michigan Public Service Commission order to initiate the provision of intraLATA dialing parity.[59/]

Given these instances of discriminatory and anti-competitive conduct, it is incumbent upon the Commission to obtain empirical data demonstrating Ameritech's compliance with the Section 272 safeguards, particularly since such safeguards directly affect the degree to which effective local competition alternatives can emerge.[60/] At present, there is simply not an adequate record upon which to conclude that Ameritech will properly comply with Section 272's nondiscrimination requirements.

IV. THE PUBLIC INTEREST REQUIRES DENIAL OF AMERITECH'S APPLICATION

The public interest compels rejection of Ameritech's Application. The Act's objective of promoting "meaningful facilities-based competition" for business and residential local exchange subscribers *has not been met in any market in the State of Michigan.* Ameritech is not actually providing competitors with all of the items enumerated in the competitive checklist, and therefore has not even begun to furnish all of the statutorily-prescribed building blocks for competition. In

---

[57/] MCTA Comments at 13-15.

[58/] Brooks Fiber Opposition at 29-34.

[59/] See, e.g., Comments of Michigan Attorney General at 7-8; ALTS Motion at 35-40.

[60/] Cf. 47 U.S.C. § 272(c)(1) (barring a BOC from discriminating "between that company or affiliate and any other entity in the provision or procurement of goods, services, facilities, or information, or in the establishment of standards").

addition, the record to date provides no basis for concluding that Ameritech will comply with the performance standards and nondiscrimination safeguards set forth in Section 272.

In addition, as the Michigan Cable Telecommunications Association points out, at the local level in Michigan, there are significant disparities in regulatory treatment between Ameritech and its competitors, which benefit Ameritech.[61/] These disparities, which can provide Ameritech with administrative, cost and operational advantages, militate against a finding that grant of the instant Application is in the public interest.

Clearly, Ameritech's Application is premature. The vast majority of business and residential subscribers within Michigan have a choice of only one local service provider. As the Michigan Public Service Commission recently stated, "[t]here is virtually no competition in local exchange markets at this time."[62/] Granting the instant Application at this time will impede the progress toward local competition in Michigan by removing the Act's most effective mechanism for breaking Ameritech's bottleneck control over local exchange service.[63/] Significantly, both the Department of Justice and the Michigan Attorney General take the position that grant of the instant Application is contrary to the public interest.[64/]

The dangers of prematurely granting the instant application are highlighted by the vigorous efforts of GTE and SNET to resist implementing the mandate for local competition set forth in Section 251. GTE and SNET have no incentive to open their networks to competition, because they already compete in the long distance business. The myriad of delaying tactics currently employed by GTE and SNET demonstrate the critical importance of the local competition incentive embodied within Section 271. Once that incentive is removed, the GTE/SNET experience

---

[61/] MCTA Comments at 19-26.

[62/] Cited in MCTA Comments at 17.

[63/] See supra notes 1-3.

[64/] DOJ Evaluation at 44; Comments of Michigan Attorney General at 9-10.

demonstrates that Ameritech can easily find ways to undermine rules that require them to negotiate and implement interconnection agreements with local service competitors seeking to offer meaningful choice to consumers.

Congress specified that the BOCs should not be permitted to enter the long distance market until there was tangible evidence that the Act had actually succeeded in stimulating significant competition from a viable, facilities-based new entrant. Thus, Ameritech's suggestion that its Application should be granted because there exists "an opportunity to compete" in the local market is unavailing.[65/] Neither the language of the Act nor the public interest supports removing the incentive embodied within Section 271 based upon speculation regarding what potential local competitors "can" do. Such a standard represents a recipe for premature entry that would jeopardize the robust local competition sought by Congress.

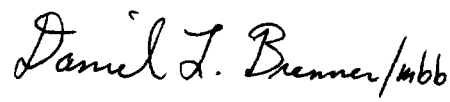
[65/] See Ameritech Brief at 4.

CONCLUSION

For the foregoing reasons, the Commission should reject Ameritech's Application to provide in-region interLATA services in the State of Michigan.

Respectfully submitted,

THE NATIONAL CABLE TELEVISION ASSOCIATION



Daniel L. Brenner
Neal M. Goldberg
David L. Nicoll
National Cable Television Association
1724 Massachusetts Avenue, N.W.
Washington, D.C. 20036
202/775-3664

Howard J. Symons
Christopher J. Harvie
Michael B. Bressman
Mintz, Levin, Cohn, Ferris
Glovsky and Popeo. P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
202/434-7300

Its Attorneys

July 7, 1997

DCDOCS: 111851.3 (2#@z03!.doc)

CERTIFICATE OF SERVICE

I, Michael B. Bressman, hereby certify that on this 7th day of July, I caused copies of the foregoing "Reply Comments in Opposition of the National Cable Television Association" to be sent by first class mail, postage prepaid to the following:

Michael B. Bressman

Kelly R. Welsh
John T. Lenahan
Michael J. Karson
Larry R. Peck
Gary L. Phillips
Ameritech Corporation
30 South Wacker Drive
Chicago, IL 60606

John M. Dempsey
Craig A. Anderson
Ameritech Michigan
444 Michigan Avenue
Detroit, MI 48226

John Gockley
Ameritech Communications, Incorporated
9525 West Bryn Mawr
Rosemont, IL 60018

Stephen M. Shapiro
Theordore A. Livingston
Douglas A. Poe
John E. Muench
Christian F. Binnig
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, IL 60603

Kenneth S. Geller
Mark H. Gitenstein
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Antoinette Cook Bush
Mark C. Del Bianco
Skadden, Arps, Slate, Meagher & Flom
1440 New York Avenue, N.W.
Washington, D.C. 20005

Todd J. Stein
Brooks Fiber Communications of Michigan, Inc.
2855 Oak Industrial Drive, NE
Grand Rapids, MI 49506

Richard J. Metzger
General Counsel
Association of Local
Telecommunications Services
1200 19th Street, N.W.
Washington, D.C. 20036

Frank J. Kelley
Attorney General
State of Michigan
P.O. Box 30212
Lansing, MI 48909

David E.S. Marvin
Michael S. Ashton
Fraser Trebilock Davis & Foster, P.C.
1000 Michigan National Tower
Lansing, MI 48933
Counsel for Michigan Cable
Telecommunications Association

Douglas W. Trabaris
Teleport Communications Group Inc.
233 South Wacker Drive
Suite 2100
Chicago, IL 60606

Roderick S. Coy
Steven Videto
Clark Hill P.L.C.
200 North Capitol Avenue
Suite 600
Lansing, MI 48933

Donald J. Russell
Chief
Carl Willner
Katherine E. Brown
Stuart H. Kupinsky
Luin Fitch
Juanita Harris
Attorneys
Telecommunications Task Force
Antitrust Division
U.S. Department of Justice
Room 8104 Judiciary Center
55 4th Street, N.W.
Washington, D.C. 20554

Chairman Reed E. Hundt*
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

Commissioner James H. Quello*
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

Commissioner Susan Ness*
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554